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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD LARRY LEDESMA,

Defendant and Appellant.

2d Crim. No. B289033
(Super. Ct. No. 17CR01821)
(Santa Barbara County)

Ronald Larry Ledesma appeals from the judgment after a jury convicted him of rape and sexual penetration by a foreign object of an intoxicated person (Pen. Code,¹ §§ 261, subd. (a)(3), 289, subd. (e)); counts 2 and 4) and two lesser included offenses of battery (§ 242; counts 3 and 5). The jury also found true the allegations on counts 2 and 4 that he had two prior serious felony convictions (§ 667, subd. (a)(1)) and served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced

¹ Further unspecified statutory references are to the Penal Code.

him to 63 years to life: consecutive 25-years-to-life terms on counts 2 and 4, two consecutive five-year terms for prior serious felony convictions, and three consecutive one-year terms for prior prison terms. It stayed the sentences on counts 3 and 5.

Ledesma contends the trial court erred when it: (1) denied his motion for a mistrial, and (2) did not stay the sentence on count 4 pursuant to section 654. The Attorney General argues the case must be remanded for resentencing because the court erred when it concluded the enhancements for the prior prison terms (§ 667.5, subd. (b)) and the prior serious felony convictions (§ 667, subd. (a)) applied once per case rather than to each count. We vacate Ledesma's sentence and remand.

FACTS AND PROCEDURAL HISTORY

Jane Doe was a guest at the Santa Barbara Rescue Mission (the Mission). She drank three boxes of wine and "blacked out." Around the time Doe went to dinner, the director of the Mission noticed that Doe appeared intoxicated and was not walking straight. Because the Mission had a sobriety contract, the director asked Doe to take a breathalyzer test. Instead of taking the test, Doe left the Mission.

Ledesma was also at the Mission. He left the Mission a minute after Doe and walked in the same direction.

A volunteer at the Mission saw Doe walking through a nearby parking lot. She saw a man approach Doe and walk with her. The man appeared to be "dragging" Doe. The volunteer informed the Mission director, and the director called 911.

Doe did not know Ledesma before this evening. She woke up the next morning naked in Ledesma's RV and "not knowing where" she was. She was not "lucid" during the incident, but remembered Ledesma had sex with her. She "felt

like it wasn't right" because she was "intoxicated to the point that [she] couldn't even like feel it or agree to it." She also remembered his penis and his fingers penetrating her vagina and that he used his fingers to feel her labia. After she woke up, she put on her dress and underwear and went to the hospital.

At the hospital, a nurse conducted a Sexual Assault Response Team (SART) examination on Doe. The nurse swabbed Doe's neck, breasts, and genitals and collected Doe's clothing, including her underwear. Doe told the nurse she met Ledesma for the first time at the Mission the night before and she went with him to his RV. Doe said he penetrated her with his fingers and penis. She said "he laughed and said he came twice inside" of her and "play[ed] with [her] vagina with his hand."

Later that day, police officers went to Ledesma's RV and asked him about the previous night. Ledesma said he went to the Mission for dinner and came home with a drunk woman who was "falling down." He said he had met the woman a "lot of times" before, and that night, they "just went to sleep" when they got to his RV. He denied having sex with her. The officers arrested him and collected DNA from his mouth, fingernails, and genitals.

A criminalist conducted DNA analysis from the samples she received from Doe and Ledesma. The DNA test from Doe's neck swab revealed that Ledesma was a major contributor. Ledesma's semen was found in Doe's underwear. Ledesma's penile swabs contained a "partial minor profile" that matched Doe's DNA. His fingernail scrapings also contained DNA matching Doe. Ledesma's DNA was not found in the initial test

of Doe's genital swab, which contained two male alleles² that did not match Ledesma's DNA. The criminalist conducted additional, and more sensitive, DNA tests on Doe's genital swabs after the trial had begun.

Relying on the initial test results, defense counsel stated in his opening statement that the "evidence will show that [Ledesma] never had sex with [Doe]" and "never digitally penetrated her." He said "[n]one of his DNA is inside her vagina. . . . There are two alleles inside of her vagina from male sperm. Neither one belongs to him."

Later that day, the prosecution received the DNA results from the more sensitive tests of Doe's genital samples, which revealed a partial minor profile that matched Ledesma's DNA. The next day, defense counsel moved for a mistrial based on his misstatement of the DNA evidence during his opening statement. Counsel admitted he knew the criminalist was doing additional tests, but he believed the test would only determine the DNA of the two unidentified male alleles, from which Ledesma had already been excluded. Counsel said he "clearly would have opened in a completely different way" if he knew about the new DNA test results before opening statement.

The prosecutor explained she had informed defense counsel of further DNA testing and that she reported the test results immediately. Defense counsel acknowledged there was no prosecutorial misconduct.

The trial court denied the motion for a mistrial. It did not find prosecutorial misconduct or any delay in presenting

² An allele is a variation of a gene. Alleles can be measured and compared to determine DNA matches. (See *People v. Nelson* (2008) 43 Cal.4th 1242, 1258.)

evidence. It noted there was no time waiver in this case, “so the [DNA test] results came when they came.” The court gave defense counsel the rest of the afternoon off to “deal with this issue.” Defense counsel later filed a formal motion for mistrial, which the court again denied.

At trial, the criminalist testified about her findings on the DNA tests, including the new test results from Doe’s genital swabs. She opined that Ledesma was the last person who had sexual intercourse with Doe.

During cross-examination, defense counsel asked the criminalist: “When I gave the opening statement, the only test that we had excluded [Ledesma]; is that right?” The criminalist explained that at that time, she did not find Ledesma’s DNA in Doe’s genital swabs. She said she conducted further testing after trial began and received the new test results after opening statements. Counsel also cross-examined the criminalist regarding the amount of DNA found on the new test results. The criminalist testified she found more of another man’s DNA than Ledesma’s DNA in the genital swabs.

Ledesma testified he knew Doe before the incident and they started “hanging out” that summer. Ledesma allowed her to come to his RV any time and, in exchange, Doe had sex and oral sex with him. He testified he had consensual vaginal and oral sex with her three days before the incident. He said he ejaculated both times. On the day of the incident, Doe came over to his RV and tried to have sex with him, but they did not have sex because he was “sick” from using heroin. When Doe left the RV, she put on underwear that belonged to another woman, with whom he had sex earlier that day.

At closing argument, defense counsel argued the DNA evidence proves Ledesma was not guilty of raping Doe and that he did not have sex with her on the day of the incident. He argued that if Ledesma had sex with Doe on the day of the incident, there would be a large amount of his DNA in Doe's genital samples rather than the small amount that was found. Counsel also argued that Ledesma's penile swabs contained only a small amount of Doe's DNA. This evidence was consistent with the theory that Ledesma had consensual sex with Doe days before the incident but not on the actual day. Moreover, Doe wore underwear that belonged to another woman who had sex with Ledesma, which explained the presence of Ledesma's sperm on the underwear.

DISCUSSION

Mistrial Motion

Ledesma contends the trial court should have granted a mistrial because defense counsel "prejudicially misstated" the facts regarding the DNA evidence in his opening statement. We disagree that a mistrial was required under these circumstances.

We review the trial court's denial of the motion for mistrial for abuse of discretion. (*People v. Harris* (2013) 57 Cal.4th 804, 848 (*Harris*).) We will not reverse unless the court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.)

Generally, a motion for mistrial will only be granted based on legal necessity. (*People v. McNally* (1980) 107 Cal.App.3d 387, 390.) A mistrial should be granted if the trial court is informed of an alleged prejudicial error that cannot be

cured by admonition or instruction and where a defendant's chances of a fair trial have been irreparably damaged. (*Harris, supra*, 57 Cal.4th at p. 848.) "A mere error of law or procedure . . . does not constitute a legal necessity." (*McNally*, at p. 390.) A defense counsel's tactical decisions may constitute a legal necessity for a mistrial only in "extreme circumstances." (*Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1525, 1529 (*Carrillo*).) Extreme circumstances constituting legal necessity have been found in instances where a codefendant's counsel disappeared near the end of trial (*People v. Manson* (1976) 61 Cal.App.3d 102), and where a defense counsel could not represent the defendant due to a conflict of interest (i.e., where counsel previously represented the victim in two cases) (*McNally*, at p. 387).

Here, the trial court properly denied Ledesma's motion for a mistrial because defense counsel's misstatement did not constitute legal necessity. Counsel had ample time and opportunity to cure any prejudice resulting from his misstatement. The misstatement occurred during the opening statement of a trial that lasted about three weeks. Counsel had two weeks to prepare the cross-examination of the criminalist, during which he was able to elicit testimony that explained his earlier misstatement. When asked about the timing of the DNA test, the criminalist testified that the initial DNA results showed no trace of Ledesma's DNA, but that additional tests conducted after trial began matched Ledesma's DNA.

Counsel also reconciled the new DNA evidence with the defense theory of the case. He cross-examined the criminalist about the amount of Ledesma's DNA found in Doe's genital swabs, and argued at closing argument that the small amount of

DNA showed Ledesma did not have sex with Doe on the night of the incident. Given that counsel was able to explain his earlier misstatement and reconcile the new DNA evidence with the defense theory of the case, the court properly denied the mistrial and proceeded with trial. (See *Carrillo*, *supra*, 145 Cal.App.4th at p. 1529 [trial court erred in declaring a mistrial based on perceived ineffectiveness of counsel where counsel’s tactics could have been successful had the trial proceeded].)

Furthermore, any prejudice was cured by the trial court’s instructions to the jury to not consider the opening statements as evidence. Before opening statements, the court instructed the jury twice that it “must use only the evidence that is presented” to decide the case and that the attorney’s “opening statements and their closing arguments . . . are not evidence.” The court reminded the jury before deliberations to decide the case “based only on the evidence that was presented to you in this trial” and that the opening statement was not evidence. We presume the jury understood and followed these instructions. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.)

Ledesma relies on *People v. Coleman* (1992) 9 Cal.App.4th 493, 497, in which a defense counsel’s misstatement during his opening statement constituted legal necessity for a mistrial. There, defense counsel stated during his opening statement that the defendant committed manslaughter and not second degree murder as charged because the defendant pointed a gun and shot the victim in self-defense. (*Id.* at p. 495.) The defendant filed a *Marsden*³ motion to substitute counsel and asserted that counsel had misstated his defense because he never

³ *People v. Marsden* (1970) 2 Cal.3d 118.

pointed the weapon at the victim and the gun fired accidentally. (*Coleman*, at p. 495.) The trial court granted the *Marsden* motion. Substitute counsel moved for a mistrial, but the trial court denied the motion. (*Ibid.*) The Court of Appeal reversed because the misstatement of the evidence “undermined [the defendant’s] credibility and created a conflict of interest.” (*Id.* at p. 496.) While the trial court substituted counsel and instructed the jury to disregard the opening statement, these remedies did not cure the harm. (*Id.* at p. 497.) The prejudice of the opening statement was “incalculable” as the jury was left with the impression that the defendant “changed stories between defense counsel.” (*Ibid.*)

Unlike *Coleman*, the misstatement here did not undermine the theory of the case, and there is no indication that counsel’s statement misstated Ledesma’s version of the facts. Despite the new DNA evidence, counsel was able to argue the same theory of the case—i.e., that Ledesma did not have sex with Doe on the night of the incident. Furthermore, the misstatement did not undermine Ledesma’s credibility because any prejudice was cured when counsel provided a reasonable explanation for his misstatement during the criminalist’s cross-examination.

Ledesma also argues that he suffered prejudice because his counsel’s misstatement prevented him from presenting an alternate defense theory—i.e., he had consensual sex with Doe on the night of the incident. But regardless of the new DNA evidence, nothing prevented him from presenting the alternate theory at trial. Here, there was other DNA evidence which showed that he had sex with Doe, including her DNA found on the penile swabs and his semen in her underwear. Ledesma opted to present the theory that he had consensual sex

with Doe days before the incident, but not on the day of the incident. Nothing required him to select this strategy.

Because Ledesma has not shown his chances of a fair trial have been irreparably damaged, the trial court acted within its discretion to deny the mistrial. (*Harris, supra*, 57 Cal.4th at p. 848.)

Count 4 Sentence

Ledesma argues the sentence on count 4 should be stayed under section 654. We disagree because each sex offense was a separate act and not incidental to each other. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

Section 654 prohibits multiple punishment for an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1216.) Generally, acts that are “merely incidental to, or were the means of accomplishing or facilitating one objective,” are indivisible and can only be punished once. (*Harrison, supra*, 48 Cal.3d at p. 335.) But crimes involving multiple sex acts close in time may be punished separately if they are divisible, as long as they are not the means of accomplishing, or incidental to, each other. (*Id.* at p. 336; *People v. Perez* (1979) 23 Cal.3d 545, 552-553.) We review the trial court’s determination of whether a defendant committed separate offenses for section 654 purposes for substantial evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

Substantial evidence supports the trial court’s finding that Ledesma committed two separate and distinct sexual acts. Doe testified she remembered that both Ledesma’s penis and his fingers penetrated her vagina and that he used his fingers to feel her labia. She also told the nurse that Ledesma “said he came twice inside” of her and “play[ed] with [her]

vagina with his hand.” Doe’s testimony and statements describe two separate acts of digital penetration and rape that were not “merely incidental” to each other. (*Harrison, supra*, 48 Cal.3d at p. 335.) Based on this evidence, the court properly declined to stay the sentence for count 4.

Ledesma appears to argue the trial court erred when it imposed consecutive terms because there was insufficient evidence that the sex acts “occurred on a separate occasion” under section 667.6, subdivisions (c) and (d). But he confuses the issue of imposing consecutive terms under section 667.6 with the issue of staying a sentence under section 654. (See *People v. Deloza* (1998) 18 Cal.4th 585, 594 [“section 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively”].) Moreover, the court did not impose consecutive terms under section 667.6. The court exercised its discretion to impose consecutive terms under the “Three Strikes” law, and also denied a stay of sentence under section 654. (See *id.* at pp. 595-596 [court retains discretion to impose consecutive sentences for qualifying crimes under the Three Strikes law that are committed on the same occasion]; §§ 667, subd. (c)(6), 1170.12, subd. (a)(6).) There was no error.

Prior Prison Term Sentencing

The Attorney General contends the judgment must be remanded for resentencing because the court did not decide whether to impose or strike three additional one-year prior prison enhancements (§ 667.5, subd. (b)). We agree.

Section 667.5, subdivision (b), provides for a one-year enhancement for each prior prison term served for any felony. Once a prior prison term is found true pursuant to section 667.5, subdivision (b), the trial court must either impose or strike the

enhancement. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Section 667.5 enhancements are to be applied individually to each indeterminate sentence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561-1562 (*Garcia*).)

Here, because the trial court imposed indeterminate life sentences under the Three Strikes law for each of counts 2 and 4, it should have imposed or stricken the prior prison term enhancements for each count, rather than once imposing them for the entire case. (*Garcia, supra*, 167 Cal.App.4th at p. 1562.) We therefore remand so the court can decide whether to impose or strike three additional one-year enhancements. (See *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254, 1256 [failure to impose an enhancement is a jurisdictional error which may be corrected on the first time on appeal, even if the correction results in harsher punishment].)

Prior Serious Felony Conviction Sentencing

When the trial court sentenced Ledesma, section 667, subdivision (a), required it to impose a five-year sentence enhancement for each of his prior serious felony convictions. Section 1385, then-subdivision (b), prohibited the court from striking those enhancements. Effective January 1, 2019, section 667, subdivision (a), gives the trial court discretion to impose or strike a prior serious felony conviction enhancement. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971; see § 1385, subd. (b)(1).)

Ledesma contends the amendments to sections 667 and 1385 apply retroactively to his case because it is not yet final. The Attorney General concedes that the amendments are retroactive, but argues that the trial court erred when it concluded the enhancements applied once per case rather than individually to each count. We agree with both contentions.

The amendments to sections 667 and 1385 apply retroactively to this case and on remand, the trial court must exercise its discretion on whether to impose or strike each enhancement. (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973.) Moreover, if imposed, these enhancements are “to be applied individually to each count” (two prior serious felony enhancements per each counts 2 and 4). (*People v. Williams* (2004) 34 Cal.4th 397, 405.)

DISPOSITION

Ledesma’s sentence is vacated, and the case is remanded to the trial court with directions to: (1) exercise its discretion to impose or strike three additional prior prison term enhancements pursuant to section 667.5, subdivision (b), and (2) exercise its newfound discretion to impose or strike the prior serious felony enhancements pursuant to sections 667, subdivision (a)(1) and 1385, subdivision (b). Ledesma has the right to assistance of counsel at the remand hearing, and, unless he chooses to waive that right, the right to be present. After the hearing, the clerk of court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Michael J. Carrozzo, Judge
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